BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDRE P. WASHINGTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,164
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, respondent and respondent's insurance carrier all requested review of the January 26, 2004 Award and the January 27, 2004 Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) heard oral argument on July 27, 2004.

APPEARANCES

Michael H. Stang of Mission, Kansas, appeared for claimant. Stephanie Warmund of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The ALJ found that claimant's May 16, 2001, accident and resulting injury arose out of and in the course of his employment with respondent. The ALJ awarded claimant permanent partial disability compensation based upon the five (5) percent functional impairment rating given by the court-ordered independent medical examiner Dr. Robert M. Beatty. But Judge Foerschler determined that claimant was not entitled to a work disability

award in excess of his percentage of functional impairment because claimant had been terminated from his employment with respondent due to an alleged violation of a company policy and, thereafter, claimant voluntarily settled his grievance action on a basis that precluded claimant from returning to work for respondent.

Claimant argues Judge Foerschler erred in denying him a work disability and requests the Board to reverse that finding by the ALJ and enter a permanent partial disability award for a 79 percent work disability based upon the average of claimant's 100 percent wage loss and 58 percent task loss. The nature and extent of claimant's disability is the only issue raised by claimant for the Board's review.

Respondent and its insurance carrier (respondent) agree with the ALJ's finding that claimant is not entitled to a work disability and further agrees with the finding of a five (5) percent functional impairment. However, respondent disagrees with Judge Foerschler's finding that claimant's accident arose out of and occurred in the course of his employment with respondent. Accordingly, it is respondent's contention that all benefits should be denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award, as amended by the Nunc Pro Tunc, contains a detailed and accurate recitation of the facts contained in the record. It is not necessary to repeat those findings in this Order. The Board adopts those findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

In *Kindel*, the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

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[1] *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[2] *Springston v. IML Freight, Inc.,* 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

> The two phrases arising 'out of' and 'in the course of' employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq*., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

In this instance, it is uncontradicted that claimant had clocked-in but had not yet begun performing his regular job duties for respondent. It is further uncontradicted that claimant was on the employer's premises at the time of the accident. However, respondent argues that claimant's activities while on the premises were not related to his normal work activities but were of a personal nature or personal errand. Therefore, the premises exception to the "going and coming" rule would not apply.[4]

At the time of his accident, claimant was on respondent's premises and had clocked -in. However, claimant had not yet started his work shift. As claimant was not working when he was injured, respondent argues that his accident did not arise out of nor occur in the course of his employment. Tim Rayburn, respondent's trailer shop manager, testified that employees, including claimant, were required to clock-in before the time their shift actually started. This requirement was for accountability and further benefitted the employer because it made sure that everybody was at their work station and ready to get started as soon as their shift began.[5] Accordingly, claimant's presence on the respondent's premises at the time of his accident was for the respondent's benefit. Because his presence conferred a benefit to respondent the Board finds claimant's accident arose out of and occurred in the course of his employment with respondent. [6]

Because claimant has sustained an injury that is not set forth in the scheduled injury

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[3] *Kindel v. Ferco Rental, Inc.,* 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[4] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994); *Bailey v. Mosby Hotel Co*., 160 Kan. 258, 267, 160 P.2d 701 (1945).

[5] Rayburn Depo. at 20 and 21.

[6] *See Hilyard v. Lohmann- Johnson Drilling Co.*, 168 Kan. 177, 211 P.2 89 (1949); Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945); *Palmer v. Lindberg Heat Treating,* 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

statute, K.S.A. 44-510d, his entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[7] and *Copeland*.[8] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[9]

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Copeland v. Johnson Group, Inc.,* 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] *Id*. at 320.

After returning to work following an injury, a worker must also make a good faith effort to retain that employment or a wage will be imputed for purposes of the permanent partial general disability formula. Respondent argues claimant was terminated for violating company policy and, therefore, claimant's permanent partial general disability should be limited to his functional impairment rating.

When claimant was terminated from his work on November 8, 2001, claimant was not working and no longer earned 90 percent of his pre-injury average weekly wage. Accordingly, under K.S.A. 44-510e and the court decisions that have interpreted that statute and its predecessor, the Board must evaluate claimant's permanent partial general disability, including whether claimant has made a good faith effort to obtain or retain employment, which is a question of fact determined on a case-by-case basis. In short, injured workers who are terminated for reasons other than their injuries are not necessarily precluded from receiving an award of permanent disability benefits for a work disability.[10]

Respondent desires the Board to limit its inquiry into whether or not respondent terminated claimant for violating company policy. The Board, however, believes the test is much broader. The Board concludes the appropriate test is whether claimant made a good faith effort to retain his employment with respondent and company policy is only one factor to be considered in that analysis.

The Board does not consider claimant's actions leading to his termination, constituted a refusal to work or the lack of a good faith effort. In addition, the grievance procedure claimant pursued following his termination further demonstrated his desire to return to work. The fact that respondent did not want to return claimant to work and a settlement was reached which precluded claimant from reapplying for work with respondent does not demonstrate a lack of good faith effort to return to work.

As stated above, the issue is not whether claimant was terminated in compliance with company policy but whether claimant has made a good faith effort to obtain and retain employment when considering all the facts and circumstances. Despite claimant's termination from respondent's employ, the Board concludes claimant made a good faith effort to retain his employment with respondent following his May 16, 2001 accident.

Although the circumstances surrounding claimant's termination do not preclude or disqualify claimant from an award based on work disability, the Board finds that under the facts of this case a work disability has not been established. This is because the greater weight of the evidence is that claimant does not have permanent work restrictions due to the accident. In this regard the Board finds the expert medical opinion testimony of Dr.

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[10] *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, *rev. denied* ___ Kan. ___ (2003); *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

Kelley and Dr. Beatty to be more credible than that of Dr. Stuckmeyer, who was the only physician to recommend permanent restrictions. The Board reaches this conclusion in part because of the fact that even Dr. Stuckmeyer initially believed claimant could return to his regular job with respondent. Claimant's symptoms had not worsened when Dr. Stuckmeyer eventually recommended restrictions almost two years after the accident. Furthermore, claimant's testimony was inconsistent about what work he could and could not do. Claimant sought to return to his regular job with respondent. In addition, the jobs claimant applied for after the accident were the same type of jobs he had performed with respondent but that Dr. Stuckmeyer's restrictions would have precluded.

In the absence of permanent restrictions, claimant's permanent partial disability award is limited to his percentage of functional impairment, which in this case is the five (5) percent opined by Dr. Beatty.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the January 26, 2004 Award as amended by the January 27, 2004 Nunc Pro Tunc entered by Administrative Law Judge Robert H. Foerschler is, although for different reasons, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and Liberty Mutual Ins. Co.
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director